IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

LARRY STOCKER,

Plaintiff,

vs. **Case No. 03-2606-GTV**

SYNTEL, INC. a/k/a SYNTEL,

Defendant.

MEMORANDUM AND ORDER

Plaintiff Larry Stocker brings this suit against Defendant Syntel, Inc., alleging that he suffered discrimination, harassment, and retaliation based upon his race, age, and national origin in violation of federal law. The case is before the court on Defendant's motion to dismiss or stay litigation pending arbitration (Doc. 5). Defendant contends that Plaintiff is bound by the arbitration clause in the employment agreement he signed before beginning employment at Syntel. For the following reasons, the court grants Defendant's motion to stay the litigation pending arbitration.

Under the Federal Arbitration Act, 9 U.S.C. §§ 1-16, the court has the authority to stay litigation pending arbitration:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement.

9 U.S.C. § 3. The Federal Arbitration Act "evinces a strong federal policy in favor of arbitration." ARW Exploration Corp. v. Aguirre, 45 F.3d 1455, 1462 (10th Cir. 1995) (citing Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987)). If an agreement contains an arbitration clause, "a presumption of arbitrability arises. . . ." Id. (citing AT&T Techs., Inc. v. Communications Workers of Am., 475 U.S. 643, 650 (1986)).

Defendant bears the initial burden of establishing that it has a valid arbitration agreement. SmartText Corp. v. Interland, Inc., 296 F. Supp. 2d 1257, 1262-63 (D. Kan. 2003) (citations omitted); Phox v. Atriums Mgmt. Co., 230 F. Supp. 2d 1279, 1282 (D. Kan. 2002). Once Defendant has met this burden, Plaintiff must demonstrate that a genuine issue of fact remains for trial. SmartText Corp., 296 F. Supp. 2d at 1263; Phox, 230 F. Supp. 2d at 1282. "Just as in summary judgment proceedings, a party cannot avoid . . . arbitration by generally denying the facts upon which the right to arbitration rests. . . ." Tinder v. Pinkerton Sec., 305 F.3d 728, 735 (7th Cir. 2002).

Plaintiff advances several arguments why the court should deny Defendant's motion to dismiss or stay proceedings pending arbitration. The court has considered all of Plaintiff's arguments, even if not specifically addressed below.

A. Enforceability of Arbitration Agreement

1. Failure to Provide Rules, Procedures, and Fees

Plaintiff first argues that the arbitration agreement is unenforceable because Plaintiff was not given the rules, procedures and fees relating to the arbitration agreement. Plaintiff contends

that because he was not provided with the pertinent literature, enforcing the agreement would "fall in the same category as cases dealing with an employee handbook which does not contain the arbitration agreement." But the arbitration agreement that Plaintiff signed was not buried in a massive employee handbook or policy manual. The arbitration agreement was on the first page of a short, two page employment agreement that Plaintiff signed.

To the extent that Plaintiff implies that he did not understand the agreement because Defendant did not offer him the rules, the court rejects this argument. This court has previously rejected claims by parties that arbitration agreements were unenforceable because they did not fully comprehend the content and implications of the contract. See, e.g., Ludwig v. Equitable Life Assurance Soc'y, 978 F. Supp. 1379, 1382 (D. Kan. 1997). Further, Plaintiff has not alleged that he was unaware of or did not understand the terms of the employment agreement. Nor has Plaintiff alleged that he asked Defendant for a copy of the rules and was denied.

The court is not persuaded that the arbitration agreement is unenforceable because Defendant failed to give Plaintiff a copy of the rules, procedures, and fees.

2. Invoking Arbitration

Plaintiff next alleges that the arbitration clause is unenforceable because "EMPLOYEE may demand arbitration by giving written notice to SYNTEL stating the nature of the controversy. SYNTEL may demand arbitration at any time." Plaintiff argues that this provision in the employment agreement is unenforceable because Defendant has reserved the right to "demand arbitration at any time." The court disagrees.

Defendant may have the right to demand arbitration at any time, but employees may demand arbitration at any time as well, given that the demand is in writing. Plaintiff's argument is unavailing.

3. Arbitrator Selection

Plaintiff also contends that the arbitration clause is unenforceable because of the term that "[a]n arbitration panel or an individual shall be selected by SYNTEL." According to Plaintiff, this provision allows Defendant to "pick its own judge and jury and potentially increase the cost to Plaintiff by naming a panel versus an individual." To the extent that Plaintiff is arguing that he is disadvantaged in the bargaining process, the court rejects his argument. "Mere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33 (1991).

Plaintiff also argues that the selection clause is highly prejudicial and against the rules of the American Arbitration Association. However, the rules provide that "[i]f the agreement of the parties names the arbitrator or specifies a method of appointing an arbitrator, that designation or method shall be followed." Commercial Arbitration Rules of the American Arbitration Association, ¶ R-12(a). The court fails to see how the selection clause conflicts with the rules of the American Arbitration Association.

For these reasons, the court is not persuaded by Plaintiff's arguments that the arbitrator selection clause is unenforceable.

4. Arbitration Location

Plaintiff also contends that the clause "the arbitration shall be held in Troy, Michigan or such other place as chosen by SYNTEL" is unenforceable because it will increase Plaintiff's arbitration costs. Plaintiff agreed to the location when he signed the employment agreement containing the arbitration provisions. Furthermore, the cost of traveling to Michigan is insufficient reason to hold the arbitration provisions unenforceable, as will be explained in more detail in the next section of this Memorandum and Order.

B. Arbitration vs. Litigation

Plaintiff claims that many of the Commercial Rules and Mediation Procedures (including Procedures for Large, Complex Commercial Disputes), should be found unenforceable, thereby voiding the arbitration provisions. Plaintiff's objections simply distinguish the differences between litigation and arbitration, and do not provide a basis for ruling that the arbitration rules are inherently prejudicial to Plaintiff.

Plaintiff also argues that "demands for plaintiff to pay exhorbitant [sic] filing and administrative fees, versus the costs of filing in federal court and to split the fees for an arbitrator warrant the agreement enforceable." "[W]here . . . a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 92 (2000). Plaintiff has not met his burden of demonstrating to the court that arbitration would be prohibitively expensive.

At the court's request, Plaintiff submitted a financial affidavit. In the affidavit, Plaintiff

stated that he would have to pay filing fees of over $8,000 to arbitrate, as well as travel expenses and other fees. Plaintiff did not estimate how much the other fees would be. He did not compare the projected costs of arbitration to the projected costs of trying his case in court, and he did not provide the court with any concrete personal financial information. He merely states that his family will suffer financial hardships and that his wife has already had to leave the home to seek employment as a result of his termination from Syntel.

Plaintiff's affidavit is insufficient to meet the Green Tree Financial Corp. standards. The court cannot make a determination whether Plaintiff has an "adequate and accessible substitute forum in which to resolve his statutory rights." Bradford v. Rockwell Semiconductor Syst., Inc., 238 F.3d 549, 556 (4th Cir. 2001). The court therefore rejects Plaintiff's contention that the costs of arbitration will be exorbitant.

C. Defendant's Waiver of the Arbitration Clause

Finally, Plaintiff claims that since Defendant did not invoke its right to arbitrate during the settlement negotiations or administrative proceedings, Defendant waived its right to enforce the arbitration provision. In determining when a party to an arbitration agreement has waived its right to arbitrate, the court considers the following six factors:

> (1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether "the litigation machinery has been substantially invoked" and the parties "were well into preparation of a lawsuit" before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) "whether important intervening steps . . . had taken place"; and (6) whether the delay "affected, misled or prejudiced" the opposing party.

McWilliams v. Logicon, Inc., 143 F.3d 573, 576-77 (10th Cir. 1998) (citations omitted).

Based on the McWilliams factors, this court fails to see how Defendant has waived its right to arbitration by not raising the issue before filing the lawsuit. Arbitration was raised in Defendant's first pleading. Defendant did not file any counterclaims, and has not engaged in discovery. Furthermore, Plaintiff has not suffered prejudice because Defendant waited until the lawsuit to raise the arbitration clause. The law does not require a party to invoke an arbitration clause prior to the filing of a lawsuit. Gratzer v. Yellow Corp., 316 F. Supp. 2d 1099, 1105-06 (D. Kan. 2004).

IT IS, THEREFORE, BY THE COURT ORDERED THAT Defendant's motion to dismiss or stay litigation pending arbitration (Doc. 5) is granted. The case is stayed pending arbitration.

Copies or notice of this order shall be transmitted to counsel of record.

IT IS SO ORDERED.

Dated at Kansas City, Kansas, this 16th day of August 2004.

/s/ G. T. VanBebber
G. Thomas VanBebber
United States Senior District Judge